85-618 (1)

NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1985

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CURTIS MILLER, ET AL.,

PETITIONER

vs.

HOGG BROTHERS PARTNERSHIP, ET AL.,

RESPONDENT

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On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED FOR REVIEW

(1) Whether plaintiffs first amended complaint failed to state a claim upon which relief could be granted pursuant to RULE 12(b)(6).

LIST OF PARTIES

The parties to this case are as follows:

Curtis Miller, Dorothy Victor, Dorothy Miller, Jeanetta Miller, Mary Lee Miller, Percy Miller, Jr., Murlon Miller, Fennie Miller, Major Miller, Freddie Miller, Bessie Brown, Mary Aldredge, Robin Miller Price, Rosie Scott, Bertha Turner, Marie Cellestine Faison, Hildred Drain, Mildred Shutes, Ruby Lee Brazle, Doris Purifoy Bryant, Paddie Sanders, Claudie Sanders, Linnie Mae Sanders, Fate Sanders, Oliver Sanders, Mary Holly, Emmitt Gray, Mary Jackson, Martha Waller, L. C. Cook, Parthenia Faison, Lucille Sanders, Curtis Watkins, Merdis Watkins, R. C. Sanders, Felton Sanders, Curtis Sanders, Mervis Lee Ezzard, Mary Louise Sanders, Robert Lee Sanders, J. V. Sanders, Dianne Sanders,

Troy Lee Sanders, Lloyd Sanders, May Ola Sanders Tatum, Jimmy L. Burns, Walter Burns, Sonny B. Burns, Azzie Lee Gaines, Mattie Mae Burns, Pearlene Burns, J. T. Burns, Roberta Burns, Lovell Burns, Rosella Burns, Ruby Jean Burns, Betty Burns, Eugene Burns, Vance Burns, Rosie Burns, Joe Burns, Luther Ray Burns, Albert Burns, Jefferson Charles Burns, Ruby Kilgore, Robin Miller, and Nellie Pearl Thompson.

Defendants

Hogg Brothers Partnership and its successors, W. C. Hogg Memorial Fund, Board of Regents of the University of Texas, Ima Hogg Foundation, Mike Hogg, Independent executive of the estate of W. C. Hogg, Jane Zibley, Co-executor of the estate of Ima Hogg, Unity Petroleum Company, Skelly Oil Company, Coats and Stowell, Inc., Woodley Petroleum Company, Magnolia Petroleum

Company, North Central Texas Oil Company and all individual firms or corporations claiming an interest in the mineral rights to the following lands situated in Union County, Arkansas:

> The Southwest Quarter of the Northeast Quarter (SW1/4 NE1/4) of Section Eight (8), Township Sixteen (16) South, Range Fifteen (15) West.

Gulf Oil Corporation, Humble Oil and Refining Company and all successive corporations to the Humble Oil and Refining Company, Tidal Oil Company, Tidal Osage Oil Company, Derby Petroleum Company and all other individual firms, partnerships, or

corporations claiming an interest in the mineral rights to the following described lands in Union County, Arkansas:

The Northwest Quarter of the Southwest Quarter (NW1/4 SW1/4) of Section Nine (9), Township Sixteen (16) South, Range Fifteen (15) West.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix C to the Petition for Certiorari and is unreported. The opinion of the United Staes District Court, Western District of Arkanss, El Dorado Division, the Honorable Oren Harris, presiding, appears in Appendix B to the Petition for Certiorari, and is unreported.

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JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 14, 1985. The Petition for rehearing was denied by the Court of Appeals for the Eighth Circuit on July 12, 1985.

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STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 42:

Section 1981. Equal rights under the law: All persons within the jurisdiction of the United States shall have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceeding for the security of persons and properties as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

UNITED STATES CODE, TITLE 42:

Section 1983. Civil Action for Deprivation of Right: Every person who, under color of any statute, ordinance, regulations, customer or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States of other persons within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the -arty injured in an action at law, suit in equity, or other proper proceedings for redress.

THE CONSTITUTION OF THE UNITED STATES ARTICLE 1, SECTION 9 CLAUSE 2:

Bill or Attainder - Ex Post Facto Laws: No bill of Attainder or Ex Post Facto Law shall be past.

THE CONSTITUTION OF THE UNITED STATES ARTICLE 1, SECTION 10, CLAUSE 1:

Powers Denied States, Treaties, Money, Ex Post Facto Laws, Obligations of Contracts: No state shall enter into any treaties, alliance, or confederation; grant letter or marques and reprisals; coin money; emit bills of credit; make anything but gold and silver coins a tender in payment of debts, pass any Bill of Attainder, Ex Post Facto Law, or law impairing the obligations of contract, or grant any title of nobility.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

Section 1. Citizens of the United States: All persons born or naturalized in the United States and subject to the

jurisdiction thereof are citizens of the United Sstates and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of the citizen of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

RULE 12 (b) (6) OF THE FEDERAL RULES OF CIVIL PROCEDURE:

Every defense, in law or fact, to a claim for relief in any pleadings, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleadings thereto if one is

required. Except at the following defenses may, at the option of the pleader, be made by motion:

(6) Failure to state a claim upon which relief can be granted. . .

STATEMENT OF THE CASE

Plaintiffs' predecessors in title obtained title to two parcels of land situated in Union County, Arkansas, hereinafter referred to as seciton (8) and section (9), from the United States Government on or about 1871. That the plaintiffs' predecessors in title continued in peaceful posession of said lands until about the year 1922 when oil was discovered on the said lands. At this time, a number of individuals and corporations began to claim title to the mineral rights. Plaintiffs' predecessors-in-title obtained the services of Attorney, A. D. Murphy, to file a quiet title action in the year 1925. Plaintiffs instituted this present action of August 23, 1983, and filed their first amended complaint on July 23, 1984, pursuant to the District Court's Order that

the plaintiffs first amended complaint alleged fraud, misrepresentation, deliberate concealment of a material fact, on the part of their attorney, A. D. Murphy, and the defendants' predecessors in title.

The District Court dismissed plaintiffs' complaint with prejudice and the plaintiffs filed a timely appeal with the Court of Appeals for the Eighth Circuit. Plaintiffs allege that the District Court erred in finding that the statute of limitations was not tolled by fraudulent concealment; that the District Court erred in finding that res judicata barred part of their claim; and that the District Court denied the plaintiffs due process of law by summarily dismissing their complaint for failure to state a claim.

The Court of Appeals for the Eighth Circuit affirmed the District Courts decision by finding that the face of the complaint showed an "insuperale barr to relief".

ARGUMENT FOR GRANTING THE WRIT

The issue involved in this Petition concerns the basic right of access to the Court to correct a grave injustice. Petitioners are black citizens of the United States and the State of Arkansas. They are decendants of Edmund Norris, Seaborn Sanders and Sylvie Norris. Edmund Norris and Seaborn Sanders were former slaves who fought in the Civil War against the Confederacy, and were rewarded by the United States Government through the purchase of forty (40) acres of land each situtated in Union County, Arkansas, in the years 1882 and 1888. The decendants of these individuals continued in peaceful possession of both forty (40) acre tracts until the year 1922, when oil was discovered on their property; at which time a number of individuals and corporations

began to claim title to the mineral rights. They consulted one A. D. Murphy, who was white, and an abstractor, in Union County, Arkansas. Subsequently, on or about 1925, A. D. Murphy, obtained his law license and filed a quiet title action in behalf of the decendents. However, unknown to these individuals, A. D. Murphy was acting in his own interests, an conspired with the defendants herein to deprive the decendants of their property rights because of their race. (See Appendix A, Amended Complaint)

No further action was taken in reference to the land until August, 1983, when the present action was filed. Subsequently, the District Court entered an Order dismissing the Complaint with prejudice, pursuant to Rule 12(b) (6), and the Eighth Circuit Ccourt of Appeals affirmed the District Court's dismissal, holding that the statute of limitations had

expired because of the allegations alleged in Paragraph twenty-five (25) of the Amended Complaint (A-16), which states as follows:

> That plaintiffs only recently discovered said fraud and conspiracy committed against their predecessors in title. That plaintiffs' predecessors in title: Riley Sanders, Janie Sanders, Rena Sanders Roberts, Melie Miller, Elijah Wilson, and Lou Cotton, were black citizens of the State of Arkansas, and uneducated for all of their lives. That plaintiffs' predecessors in title named above made every effort to obtain an attorney during their lifetime to represent them in this matter; that all the attorneys

they contacted refused to take their case. That the immediate children of plaintiffs' predecessors in title are also black citizens of the State of Arkansas, and uneducated and all attempts made by them to obtain an attorney to pursue this matter in their behalf were futile; that plaintiffs' predecessors in title's grandchildren made numerous efforts to obtain an attorney to represent them in this matter, and all attorneys they contacted refused to take their case until the obtained their present attorney. That plaintiffs' have made every effort to protect their interest, and only recenty did they find an attorney who would pursue this matter on their behalf.

It is well settled that considering the merits of Rule 12(b) (6) Motion, the Court must deny the same unless it appears beyond a doubt that the plaintiffs' can prove no set of facts in support of their claim which would entitle them to relief, Dresser Industries, Inc. vs. United States, 596 F.2d 1231, cert. den. 444 U.S. 1044, 621. ed. 2d 730, 100 s.ct. 731 (5th cir. 1979). The Court of Appeals for the Eighth Circuit employ the rational that if Petitioners ancestors were looking for an attorney, then they must have known of the fraud and conspiracy during their lifetime. This hypothesis on the part of the Court of Appeals is clearly in err and directly contradicts the well established maxim that the District Court must read the complaint in a light most favorable to the plaintiffs and give the plaintiffs the benefits of all inferences when considering

a Motion to Dismiss, Cody vs. Union Electric, 518 F.2d 978 288 F.2d 601 (6th cir. 1961).

The allegations contained in Paragraph twenty-five (25) when read in the light most favorable to the plaintiffs', show that these individuals were black citizens uneducated and seeking the services of an attorney to look into their case and make a determination of whether they had a cause of action. Clearly, this view is consistant with the purpose and intent of the Federal Rules, and would follow the general rule that factual allegations in the complaint are accepted as true for the purposes of considering a defense motion to dismiss, Bankord vs. DeRock, 423 F. supp. 602 (1976), it is also consistent with the well-established principle that Motions to Dismiss are not favored and should be granted only where it appears to a

certainty that no set of facts would be proven at trial which would entitle plaintiffs' to relief, Conly vs. Gibson, 355 U.S. 41 (1957).

It is also well established that the Court is not permitted to delve into extraneous evidence when considering a Motion to Dismiss, but must confine the scope of its analysis to matters presented by the pleadings, memorandums, briefs, and oral argument, Cohen vs. United States, 129 F.2d 733 (8th cir. 1942). In the present case, the Court of Appeals totally ignored the vast majority of the allegations contained in the First Amended Complaint (Appendix A). There are numerous allegations of fraud, misrepresentation, concealment of material fact and conspiracy between the defendants and the attorney who represented the petitioners ancestors.

When equitable estoppel has been alleged in a complaint, the United States Supreme Ccourt has stated firmly its position, "To decide the case, we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our Juris Prudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on the statutes of limitation." Glus vs. Brooklyn Eastern Terminal, 359 U.S. 231, 232, 233 (1959). In Glus supra, the Petitioner claimed that respondents were estopped from raising the statute of limitation because he had induced Petitioner to believe that he had seven (7) years in which to sue. The United States Supreme Court reversed the judgement for respondent. Earlier the United States Supreme Court in Holmberg vs. Armbrecht,

327 U.S. 392, 397 (1945), stated "This Court long ago adopted as its own the old Chancery Rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party".

The doctrine of equitable estoppel in tolling the statute of limitation established by the United States Supreme Court has been followed by state and circuit courts in a vast number of cases. In Bell vs. City of Milwaukee, 514 F. supp. 1363, the Court held that the doctrine of fraudulent concealment applied to toll the statute of limitations where allegations of

broadly based racial motivated conspiracy by police officers and employees were designed to conceal and cover up the wrongful acts of police officers, if proven to be true, where allegations of conduct so unfair, misleading and outrageous as to out balance the public interests in asserting statutes of limitations. The same principle was applied in Barrett vs. Hoffman, 686 F.2d, 324 (2nd cir. 1982), a medical malpractice case. For an excellent review see 43ALR 3rd. 429.

The tolling rule in Arkansas was expressed in William vs. Purdy, 223 Ark. 275, 265, S.W.2d 534 (1954), wherein the Arkansas Supreme Court held "No mere ignorance on the part of plaintiffs of his rights nor the mere silence of one who is under no obligation to speak will prevent the statutes bar. There must be some positive act of fraud, something so

furtively planned and secretly executed as to keep the plaintiffs cause of action concealed or perpertrated in a way that it conceals itself, and if the plaintiff by reasonable diligence might have detected the fraud, he is presumed to have knowledge of it." The Court in Purdy, supra also held that some affirmative act of concealment must be done; mere failure to reveal is not enough unless there is a duty to speak (265 Ark. 536). It is important to note that the conspiracy, fraud and concealment of a material fact complained of in Petitioners Amended Complaint were perpetrated on Petitioners ancestors by their attorney, who conspired with the defendants and their predecessors in title. Since it is alleged that plaintiffs' attorney was part of this conspiracy, fraud and concealment of a material fact, he had an obligation to speak and tell the truth to Petitioners ancestors and to protect

their interests. Therefore, the tolling statute in Arkansas would be applicable to the present case.

Subsequently the Arkansas Supreme Court reiterated their tolling rule in Walters vs. Lewis, 276 Ark. 286, 634 S.W.2d. 129 (1982), and held that the plaintiffs cause of action accrues when he discovers the fraud, or when he should have discovered the fraud, with the exercise of reasonable diligence. Paragaph twenty-five (25) of Petitioners Amended Complaint clearing shows that Petitioners used reasonable diligence in trying to discover the fraud committed against them, because they were unable to read or write, they had no alternative but to try and retain an attorney to review their case, and all attorneys they contacted refused to take their case except for their present

counsel. Unquestionably, if Petitioners and their ancestors had made no effort to retain the services of an attorney to review their case for possible fraud, then they would not have exercised reasonable diligence to protect their interests. This case presents the exact fact situation that the United States Supreme Court so adamantly renouced in Glus vs. Brooklyn Eastern Terminal, supra.

CONCLUSION

The cornerstone to our system of justice is the right of all citizens to have access to our courts. Once again this Honorable Court has been asked to protect that basic right. The District Court and the Court of Appeals have had ample opportunity to correct this injustice. They have declined to do so. Petitioners earnestly pray that for the foregoing

reasons this Honorable Court will reverse the judgment of the Court of Appeals which improperly granted the defendants' Motion to Dismiss pursuant to Rule 12(b)(6), and allow them the basic right of every American citizen to file their grievance in a Court of Law.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

CURTIS MILLER, ET AL. PLAINTIFFS	)	
vs.	)	CLASS ACTION NO. 83-1117
HOGG BROTHERS PARTNERSHIP, ET AL., DEFENDANTS	)	

FIRST AMENDED COMPLAINT

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1343 et seq. in order to secure the relief authorized by 42 U.S.C. Sub. Sec. 1981, 1982, 1983 and 1985; Article 1, Sec. 9, Clause 3 and Article 1, Sec. 10, Clause 1 of the U. S. Constitution Equal Protection and Due Proces Clause of the 14th Amendment to the United States Constitution.

II

This is an action for damages for injuries to the plaintiffs and their class because of deprivations by the defendants, acting in concert, of plaintiffs' rights and privileges of citizenship. Further, this is an action for damages for acts undertaken by the defendants, or not taken by the defendants, under the color of law, to redress the injuries sustained by the plaintiffs because of the same.

II

This is an action for declaratory judgment to declare the rights and other legal relations between the parties.

IV

Plaintiffs in this action are Curtis Miller, Dorothy Victor, Dorothy Miller, Jeanetta Miller, Mary Aldredge, Murlon Miller, Bessie Brown, Rosie Scott, Hildred Drain, Percy Miller, Jr., Mildred Shutes, Ruby Lee Brazle, Robert Lee Sanders, J. V. Sanders, Sonny B. Burns, J. T. Burns, Roberta Burns and Mattie Mae Burns; and they bring this action as a class action composed of all the heirs at law of Edmund Norris, Sylvie Norris and Seaborn Sanders.

That other class members included Mary Lee Miller, Fennie Miller, Major Miller, Freddie Miller, Robin Miller, Bertha Turner, Mary Cellestine Faison, Doris Purify Bryant, Paddie Sanders, Claudie Sanders, Linnie Mae Sanders, Fate Sanders,

Oliver Sanders, Mary Holly, Emmitt Gray, Mary Jackson, Martha Waller, L. C. Cooks, Parthenia Faison, Lucille Sanders, Curtis Watkins, Merdis Watkins, R. C. Sanders, Felton Sanders, Curtis Sanders, Murvis Lee Ezzard, Mary Louise Sanders, Dianne Sanders, Troy Lee Sanders, Lloyd Sanders, May Ola Sanders Tatum, Jimmy L. Burns, Walter Burns, Azzie Lee Gaines, Pearlene Burns, Lovell Burns, Rosella Burns, Ruby Jean Burns, Eugene Burns, Vance Burns, Betty Burns, Rosie Burns, Joe Burns, Luther Ray Burns, Albert Burns, Jefferson Charles Burns, Ruby Kilgore and Nellie Pearl Thompson.

VI

The plaintiffs bring this action against the defendants as a class composed of all past and present individuals,

firms, partnerships, corporations, or other entities, who have claimed or are presently claiming a mineral interest in the following described lands situated in Union County, Arkansas:

> The southwest quarter of the northeast quarter (SW1/4 NE1/4) of section eight (8), township sixteen (16) south, range fifteen (15) west; The northwest quarter of the southwest quarter (NW1/4 SW1/4) of section nine (9), township sixteen (16) south, range fifteen (15) west.

VII

The plaintiffs state that the class of the defendants is so numerous that joiner of all member is impracticable; that there are questions of law or facts common to the class; that the defenses of the representative parties are typical of the defenses of the class; and that the representative parties will fairly and adequately protect the interests of the class.

VIII

The plaintiffs and their class are, and constitute, all the heirs of Edmund Norris and Sylvie Norris and Seaborn Sanders; that on or about the tenth (10th) day of June, 1992, Edmund Norris, by purchase from the United States of America, became the owner of the following lands in Union County, Arkansas:

> The northwest quarter of the southwest quarter (NW1/4 SW1/4) of section nine (9), township sixteen (16) south, range fifteen (15) west.

That Seaborn Sanders purchased from the United States Government in the year 1888 the following described lands in Union County, Arkansas:

> The southwest quarter of the northeast quarter (SW1/4 NE1/4) of section eight (8), township sixteen (16), range fifteen (15) west.

IX

That Edmund Norris died in the year 1894, leaving as his only heir at law Sylvie Norris, his wife, who died in the year 1899. That the heirs at law of Sylvie Norris, on the date of her death, was Eliza Sanders, the wife of Seaborn Sanders.

X

That Seaborn Sanders and Eliza Sanders had born to them of their marriage the following children: Riley Sanders, Neil Sanders, Mary Barnes, Melie Miller, Lou Cotton, and Maggie Sanders. That Maggie Sanders died in the 1913 leaving surviving as her sole heir at law her son, Elisha Wilson.

XI

That Edmund Norris died in the year 1894. That Sylvie Norris died in the year 1899. That Neil Sanders died in the year 1916, leaving surviving him his widow, Rena Sanders Roberts. That Elisha Wilson died leaving no issue or widow. That Melie Miller died intestate leaving as her only heirs at law, plaintiffs herein Curtis Miller, Jenks Miller (deceased), Allen Miller (deceased) and Mary Miller (deceased). That plaintiff Dorothy Miller is the wife of Jenks Miller (deceased). That plaintiffs Jeanetta Miller and Dorothy Victor are the children of Jenks Miller (deceased). That other children of Jenks Miller were Elbert Miller (deceased) who died with no children, and Percy Miller (deceased) who died leaving as his survivors plaintiffs Mary Lee Miller (his

wife), Percy Miller Jr., and Murlon Miller, his children. That Allen Miller (deceased) died intestate leaving as his sole heirs at law plaintiffs Fennie Miller (his wife), Major Miller, Freddie Miller, Bessie Brown, Mary Aldredge, Robin Miller, Rosie Scott, and Bertha Turner, his children. That Mary Miller died intestate leaving surviving her as her sole heirs at law her children, plaintiffs Marie Cellestine Faison and Hildred Drain.

XII

That Riley Sanders (deceased) married Janie Sanders (deceased), and they died intestate leaving surviving them as their sole heirs at law plaintiffs herein Mildred Shutes, Ruby Lee Brazle, Doris Purifoy Bryant, Paddie Sanders, Claudie Sanders, Lennie Mae Sanders, Fate Sanders, Olvier Sanders, Mary Lisa Holley, Emmitt

Gray, Mary Jackson, Martha Waller, L.C. Cook, Parthenia Faison, Lucille Sanders, Curtis Watkins, Merdis Watkins, R. C. Sanders, Felton Sanders, [illegible] V. Sanders, Dianne Sanders, Curtis Sanders, Mervis Lee Ezzard, Mary Louise Sanders, Robert Lee Sanders, Troy Lee Sanders, Lloyd Sanders and Mae Ola Sanders.

XIII

That Mary Sanders Burns (deceased) died intes-tate leaving as her sole heirs at law plaintiffs herein Jimmy L. Burns, Walter Burns, Sonny B. Burns, Azzie Lee Gaines, Mattie Mae Burns, Pearlene Burns Manning, J. T. Burns, Roberta Burns, Lovelle Burns, Ruby Jean Burns, Eugene Burns, Vance Burns, Betty Burns, Rose Burns, Joe Burns, Luther Ray Burns, Albert Burns, Jefferson Charles Burns, Ruby Kilgore, Rosella Burns, and Nellie Pearl Thompson.

XIV

That Neil Sanders married Rena Sanders, both of whom died intestate with no children, leaving plaintiffs herein as their sole heirs at law.

XV

That Lou Sanders Cotton died intestate leaving no issues and no surviving spouse, and plaintiffs herein constitute the sole heirs at law of Lou Sanders Cotton.

XVI

That Maggie Wilson Sanders died intestate leaving as her sole heirs at law, her son, Eliza Wilson, who died leaving no surviving spouse or children. That the plaintiffs herein constitute his sole heirs at law.

XVII

That the plaintiffs and their class herein are black citizens of the United States of America and constitute the sole heirs at law of Edmund Norris, Sylvie Norris, his spouse, Seaborn Sanders, and Eliza Sanders, his spouse; all of whom were black citizens of the United States of America.

XVIII

That Riley Sanders, Meil Sanders, Rena Sanders Roberts, Mary Burns, Melie Miller, Lou Cotton, and Elisha Wilson continued in peaceful possession of the lands that are the subject of this law suit (hereinafter referred to as section eight and section nine) until the year 1922 at which time oil was discovered on said property.

XIX

After said date, the defendants and members of their class constituting their predecessors in title conspired to defraud the heirs of Edmund Norris, Sylvie Norris, Seaborn Sanders and Eliza Sanders of their property interest because of their race. All members of defendants class were composed of white citizens and or firms, corporations, partnerships or their entities--all of whom represented white citizens of the United States of America.

XX

In the year 1925, the plaintiffs' predecessors in title, Riley Sanders, and his wife, Janie Sanders, Rena Sanders Roberts, Melie Miller, Elijah Wilson, and Lou Cotton, filed suit in the Chancery

Court of Union County, Arkansas, to quiet title to section (9) against defendants and their predecessors in title; that the defendants and their predecessors in title to said lands, conspired and obtained a judgment through fraud to deprive plaintiffs to their interests in said lands because of their race. That the judgment ob. ined against the plaintiffs and their predecessors in title is void because it was based upon fraud, misrepresentation, and concealment of material facts from plaintiffs by defendants and their predessors in title and plaintiffs' attorney. That specific allegations of fraud are as follows:

(A) That in the year 1922, one of the plaintiffs' attorneys, A. D. Murphy, who was then an abstractor, discovered that plaintiffs had true

title to section (9) and that a white person, Aylmer Flenniken, was also claiming title to said propery. That A. D. Murphy conspired with Aylmer Flenniken to deprive plaintiffs and plaintiffs' predecessors in title of their mineral interests to section (9).

(B) That after plaintiffs' attorney, A. D. Murphy, obtained his law license, plaintiffs retained him to file suit to recover their interests in section (9). That, from 1922 through July 31, 1939, the defendants predecessors' in title, through their agent, A. D. Murphy, who was acting as plaintiffs' attorney, made numerous representations of material facts to plaintiffs and their

predecessors in title knowing that said representations were false; that such representations were not actually believed by A. D. Murphy, the defendants predecessors in title's agent; that defendants' predecessors in title with the intent that they should be acted on by plaintiffs' predecessors in title; that the misrepresentations and concealments of fact by defendants' predecessors in title through their agent, A. D. Murphy, was in fact acted on by plaintiffs' predecessors in title to their damage. That plaintiffs' predecessors in title, in acting on the representations of defendants' predecessors in title's agent, A. D. Murphy, were ignorant of the falsity of the representations and reasonably

believed them to be true. That defendants and their predecessors in title derived their title from the decision of the Arkansas Supreme Court's interpretation of Act No. 80 of 1923. That Act No. 80 of 1923 passed by the Arkansas Legislature on February 9, 1923, is void and of no effect because it violates Article 1, section 9 clause 3 and Article 1, section 10 clause 1, and the due process and equal protection clauses of the Constitution of the United States.

XXI

That the representations and concealment of facts by the defendants' predecessors in title through their agent, A. D. Murphy consisted of, but was not limited to, the following:

(A) Defendants predecessors in title's agent, A. D. Murphy, failed to disclose to plaintiffs his intent to assist defendants to their lawsuit.

(B) On November 12, 1927, A. D. Murphy, agent for defendants predecessors in title, testified in a lawsuit in which he was repesenting plaintiffs, and, in doing so, disclosed confidential information that was detrimental to plaintiffs in furtherance of the conspiracy between defendants' predecessors in title and their agent, A. D. Murphy.

(C) On April 2, 1925, in furtherance of the conspiracy between defendants' predecessors in title and A. D. Murphy, their agent A. D. Murphy forged the names of the plaintiffs' predecessors in title to a certain deed which is recorded or record in Union County, Arkansas, purporting to make himself Trustee for plaintiffs' predecessors in title; that A. D. Murphy was not authorized to act as plaintiffs' predecessors in title's trustee.

(D) On June 23, 1928, defendants' predecessors in title's agent, A. D. Murphy executed a certain quitclaim deed as Trustee for plaintiffs' predecessors in title without the authority from plaintiffs' predecessors in title to do so, and, in executing the quitclaim deed,

A. D. Murphy was acting as agent for defendants' predecessors in title, all to plaintiffs' predecessors in title's damage.

(E) On or about July 31, 1939, in furtherance of the conspiracy, defendants predecessors in title's agent, A. D. Murphy, executed a quitclaim deed as Trustee for plaintiffs' predecessors in title, which is recorded or record in Union County, Arkansas, without the authority to do so from plaintiffs' predecessors in title in furtherance of the conspiracy between A. D. Murphy and defendants' predecessors in title.

(F) Defendants' predecessors in title's agent, A. D. Murphy, failed to

challenge Act No. 80 of 1923, passed by the Arkansas Legislature on February 9, 1923 as a bill of attainder in furtherance of his conspiracy with defendants' predecessors in title.

(G) Defendants' predecessors in title's agent, A. D. Murphy, while acting as plaintiffs' predecessors in title's attorney, concealed from plaintiffs that he had in fact filed two separate law suits concerning sections eight and nine. That these representations were material facts, were false, and relied upon by plaintiffs' predecessors in title; that such representations were not believed by defendants' predecessors in title's agent, A. D. Murphy, and were made with the intent that plaintiffs' predecessors in

title did in fact act upon these representations to their damage and, in doing so, plaintiffs' predecessors in title were ignorant of the falsities and reasonably believed them to be true.

XXII

That the defendants and their class consisting of their predecessors in title, knew of the conspiracy and fraud committed against plaintiffs' predecessors or by reasonable inquiry should have known.

XXIII

That defendants and their predecessors in title of Hogg Brothers Partnership, W. C. Hogg Memorial Fund, Board of Regents of the University of Texas, Ima Hogg Foundation, North Central Texas Oil Company, Unity Petroleum Company, Skelly

Oil Company, Coats & Stowell, Inc., Woodley Petroleum Company, Magnolia Petroleum Company, and A. V. Beebe Oil Company, all derived their interests in the mineral rights to section (8) from plaintiffs' predecessors in title, Riley Sanders, Janie Sanders, Rena Sanders Roberts, Melie Miller, Elijah Wilson, and Lou Cotton. That the deeds that defendants purported to convey them mineral interests in said lands are void and of no effect because they were procured by fraud, misrepresentation and concealment of material facts by defendants and their predecessors in title through their agent, A. D. Murphy, who was acting at the time as the attorney for plaintiffs' predecessors in title. That the fraud, misrepresentation and concealment of material facts consisted of but was not limited to the following:

1. That on or about July 26, 1927, and continuing through 1939, W. C. Hogg, Mike Hogg, T. E. Hogg, and Ima Hogg, a co-partnership, doing business under the name of Hogg Brothers, conspired with A. D. Murphy, attorney for plaintiffs' predecessors in title to deprive plaintiffs' predecessors in title of their interests in section (8).

2. That on or about July 26, 1927, and continuing through 1939, defendants' predecessors in title's agent, A. D. Murphy, in furtherance on the conspiracy, represented to plaintiffs' predecessors in title that only one lawsuit had been filed in their behalf and the defendants' predecessors in title's agent, A. D. Murphy executed a number of deeds granting mineral rights to defendants' predecessors in title to section (8). That these acts

on the part of A. D. Murphy were done without the knowledge or consent of plaintiffs' predecessors in title; that defendants have continued to benefit from said misrepresentation through the present date by collecting royalty payments for oil and gas produced from section (8).

3. That these representations by defendants' predecessors in title's agent, A. D. Murphy, were of a material fact; that such representation was false; that such representation was not actually believed by defendants' predecessors in title's agent, A. D. Murphy; that such representations were made with the intent that it would be acted upon by plaintiffs' predecessors in title; and that the representations were in fact acted on by plaintiffs' predecessors in title to their damage; that in so acting, plaintiffs'

predecessors in title were ignorant of the falsity of the representations and believed them to be true.

4. That on or about July 10, 1925, the defendants' predecessors in title: W. C. Hogg, Mike Hogg, T. E. Hogg, and Ima Hogg, as a co-partnership of Hogg Brothers, acquired from their agent, A. D. Murphy, a certain Oil, Gas, and Mineral Royalty Deed which was signed by A. D. Murphy, as Trustee for plaintiffs' predecessors in title. That plaintiffs' predecessors in title never granted the authority for A. D. Murphy to execute such deed and plaintiffs' predecessors in title never received any benefits of royalty payments under said deed. That said deed is a gorgery, and is not executed with the form prescribed by law.

5. That on July 10, 1925, a certain deed filed of record in the books and records of Union County, Arkansas, purporting to be a deed from plaintiffs' predecessors in title to W. D. Wingfield, Trustee, was executed by defendants predecessors in title's agent, A. D Murphy, purporting to act as Trustee for plaintiffs' predecessors in title; that A. D. Murphy never had authority or authorization from plaintiffs' predecessors in title to execute such deed and plaintiffs' predecessors in title never received any of the consideration for said deed and plaintiffs' predecessors in title have not received any of the royalty interests that were reserved to them under the said deed. That the Grantee of said deed knew, or should have known upon reasonable inquiry, that A. D.

Murphy had no authority to act as plaintiffs' trustee.

6. That on or about September 30, 1925, defendants W. C. Hogg, Mike Hogg, T. E. Hogg, and Ima Hogg, a co-partnership doing business under the name of Hogg Brothers, were the Grantees of a purported deed executed by their agent, A. D. Murphy, as Trustee for plaintiffs' predecessors in title; that A. D Murphy had no authority to execute such deed on behalf of the plaintiffs' predecessors in title. That plaintiffs' predecessors in title received no benefits, nor have any royalty payments been made to plaintiffs' predecessors in title under said deed. That the grantees under said deed knew, or by reasonable inquiry would have known, that A. D. Murphy had no authority to sign the deed as plaintiffs' predecessors in title's trustee.

7. That on or about May 13, 1926, defendants and their predecessors in title, James Dugan, Trustee; Hogg Brothers Partnership; T. S. Grayson, Trustee; E. C. Lyle, Trustee; B&H&M Oil Company; and North Central Oil Company purported to convey to Woodley Petroleum Company a modification of a lease for section (8); that said modification of the lease reserved unto the land owners a 1/8th interest in Casinhead Gasoline. That defendants predecessors in title have refused to pay over to plaintiffs their 1/8th interests under the modification of the lease because of plaintiffs' race; and the same is due and payable from June 2, 1926 through the present date.

8. That these representations to plaintiffs by defendants and their predecessors in title were of a material

fact; that such representations were false; that these representations were not actually believed by the defendants or their predecessors in title, and were made with the intent for plaintiffs and plaintiffs' predecessors in title to act upon the same; that plaintiffs and their predecessors in title did in fact act on the representations of defendants and their predecessors in title; and in so acting, plaintiffs and their predecessors in title were ignorant of the falsity of the representations and reasonably believed them to be true.

XXIV

That defendants and their class consisting of their predecessors in title knew of the conspiracy and fraud committed

against the plaintiffs and the plaintiffs' predecessors in title, or, by reasonable inquiry would have known.

XXV

That plaintiffs only recently discovered said fraud and conspiracy committed against their predecessors in title. That plaintiffs' predecessors in title: Riley Sanders, Janie Sanders, Rena Sanders Roberts, Melie Miller, Elijah Wilson, and Lou Cotton, were black citizens of the State of Arkansas and uneducated for all of their lives. That plaintiffs' predecessors in title named above made every effort to obtain an attorney during their lifetime to represent them in this matter; that all the attorneys they contacted refused to

take their case. That their immediate children of plaintiffs' predecessors in title are also black citizens of the State of Arkansas, and uneducated and all attempts made them to obtain an attorney to pursue this matter in their behalf were futile; that plaintiffs' predecessors in title's grandchildren made numerous efforts to obtain an attorney to represent them in this matter and all attorneys they contacted refused to take their case until they obtained the present attorney. That plaintiffs have made every effort to protect their interest and only recently did they find an attornewy who would pursue this matter on their behalf.

XXVI

That defendants and their class have continued to benefit from the fraud,

conspiracy, and discrimination against plaintiffs and their class and their predecessors in title because of their race by continuing to receive royalty payments from the property that is the subject of this lawsuit through the present date.

XXVII

That in conspiring to do the acts complained of herein, defendants and their class have deprived the plaintiffs of equal benefits of the law for the security of the persons and property as enjoyed by white persons because of their race.

XXVIII

That in conspiring to do the acts complained of herein, defendants and their class deprived the plaintiffs of their

right to inherit, purchase, sell, lease, hold and convey real property as enjoyed by white citizens because of their race.

XXIX

That in conspiring to do the acts complained of herein defendants and their class acted under color of law, statutes, ordinances, and customs of the State of Arkansas, to cuse the plaintiffs to be deprived of their rights and privileges and immunities secured by the Constitution and Laws of the United States, because of their race.

XXX

That plaintiffs have exhausted all remedies and have no other relief

available to them except for this suit for injunctive and declaratory relief.

WHEREFORE, plaintiffs pray that this Court grant them the following relief:

1. Enjoin the payment of any further royalties from the tracts of land that are the subject of this action pending resolution of this matter.

2. Aware plaintiffs and their class compensatory damages for the discriminatory acts of defendants and their class in the amount of Twenty Million Dollars.

3. Appoint a Master to make an accounting between the parties for all

royalties paid for oil and gas or other mineral rights concerning said property and to pay over to plaintiffs their portion of said royalties.

4. Declare that the plaintiffs have been the victims of defendants systematic and individual racism.

5. Declare that plaintiffs and their class are the true owners of the mineral rights to the property that is the subject of this lawsuit.

6. Award plaintiffs their costs, attorney fees, and all other relief to which they are entitled.

Respectfully submitted,

_____

James E. Smedley
Attorney for Plaintiffs
221 West Second Street
608 Pyramid Place
Little Rock, AR 72201
(501) 372-3583

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

CURTIS MILLER, ET AL. PLAINTIFFS	)	
VS.	)	CASE NO. 83-1117
HOGG BROTHERS PARTNERSHIP, ET AL., DEFENDANTS	)	

ORDER

The complaint was filed in the above-styled case August 23, 1983. Several Motions to Dismiss were filed by separate defendants. The Court at pretrial conference hearing held June 20, 1984, heard argument by counsel for all the parties on the pending Motions. The Court ruling from the bench gave the plaintiffs thirty (30) days to file an amended complaint making the allegations more

definite and setting forth with specificity and particularity the actors and actions in the alleged fraud and conspiracy.

On July 23, 1984, the plaintiffs filed their first amended complaint. The amended complaint alleges causes of action under 42 U.S.C. Sub.Sec. 1981, 1982, 1983 and 1985; and Article 1, Sec. 9, clause 3 and Article 1, Sec. 10, clause 1 of the United States Constitution, through the Equal Protection and Due Process clauses of the 14th Amendment to the United States Constitution.

In their amended complaint the plaintiffs claim damages for fraud and conspiracy to defraud committed by the agent of certain defendants upon the plaintiffs' predecessors-in-interest. More specifically, the plaintiffs claim

A. D. Murphy, one of the attorneys for their predecessors-in-interest, in 1922 began to conspire with Aylmer Flenniken to deprive them of their mineral interests in the southwest quarter of the northeast quarter of sections eight and nine, township sixteen south, range fifteen west. In furtherance of the conspiracy, it is alleged Mr. Murphy made false representa-tions and concealed the fraud. These acts of fraud allegedly occurred in a period from 1922 to 1939. The amended complaint also states that the plaintiffs only recentlyu discovered the alleged fraud.

In response to plaintiffs' amended complaint, the defendants Exxon, Gulf and North Central Oil Corporation filed separate Motions to Dismiss on August 10, 1984. The defendants, Hogg Brothers

Partnership, W. C. Hogg Memorial Fund, Board of Regents of the University of Texas, Ima Hogg Foundation, Mike Hogg and Jane Zibley filed their Motion to Dismiss August 13, 1984. The Motions to Dismiss state as ground for dismissal, inter alia, the statute of limitations and the doctrine of res judicata.

The statute of limitations applicable in this case is five (5) years. See Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982) (where there is no federal statute of limitations, the court should adopt the "catch all" statute of limitations in the state where the suit is brought).

The plaintiffs contend in their response filed November 21, 1983, that the statute of limitations is tolled because

of the doctrine of estoppel reliance. Arkansas recovnizes the doctrine of estoppel reliance where some affirmative act of concealment of the fraud is found. See Williams v. Purdy, Executrix, 223 Ark. 275, 265 S.W.2d 534 (1954); Wrinkles v. Brown, 217 Ark. 393, 230 S.W. 2d 39 (1950); Walters v. Lewis, _____ Ark. _____, 634 S.W.2d 129 (1982).

The plaintiffs allege in their amended complaint specifically in the pertinent part:

> The plaintiffs only recently discovered said fraud and conspiracy commited against their predecessors-in-title. That plaintiffs predecessors-in-title: Riley Sanders, Janie Sanders, Rena Sanders Roberts,

Melie Liller, Elijah Wilson and Lou Cotton, were black citizens of the State of Arkansas, and uneducated for all of their lives. That plaintiffs' predecessors-in-title named above made every effort to obtain an attorney during their lifetime to represent them in this matter; that all the attorneys they contacted refused to take the case. That their immediate children of the plaintiffs' predecessors-in-title also are black citizens of the State of Arkansas, and uneducated and all attempts made by them to obtain an attorney to pursue this matter in their behalf were futile; that plaintiffs predecessors-in-title's grandchildren made numerous efforts to obtain an attorney to represent them in this matter and all

attorneys they contacted refused to take their case until they obtained the present attorney. That plaintiffs have made every effort to protect their interests and only recently did they find an attorney who would pursue this matter on their behalf."

There are several aspects of the plaintiffs' amended complaint which are troubling to the Court.

It appears to this Court from the paragraph of the plaintiffs' amended complaint quoted above that, although the plaintiffs state they have only recently discovered the fraud, in the same breath they admit they have for three generations made every effort to obtain an attorney to represent them in this matter. In other

words, they have been aware of this alleged fraud for some time.

In the case of Walters v. Lewis, supra, the Arkansas Supreme Court stated that in cases of fraud "the cause of action accrue(s) when the fraud is discovered, or should have been discovered, with the exercise of reasonable diligence." There are undisputed facts present in this case which would indicate to the Court that the alleged fraud should have been discovered with the exercise of reasonable diligence.

One such fact apparent from the amended complaint and the record as a whole is that the plaintiffs' predecessors-in-interest brought quiet title actions in 1925 in the Union County

Chancery Court concerning both sections eight and section nine, the land at issue in the instant case. The plaintiffs sought to cancel certain conveyances under which the defendant Mary Flenniken claimed title. The defendant obtained her deed from her husband, who in turn obtained it at a foreclosure sale in 1907. The suit concerning section nine was eventually settled and dismissed with prejudice (see defendant's exhibit #2). As to the suit concerning section eight, the Chancery sustained a demurrer to the complaint. The plaintiffs appealed, Sanders v. Flenniken, 172 Ark. 454, 289 S.W. 485, and the decree was reversed because the defenses raised by the demurrer (laches and statute of limitation) should have been raised by answer instead. Upon remand, the plaintiffs introduced evidence

tending to establish their claim to the land. The chancellor found, however, the plaintiffs' were guilty of laches and their complaint was dismissed. The chancellor's ruling was again appealed to the Arkansas Supreme Court, Sanders v. Flenniken, 180 Ark. 303, and the Supreme Court affirmed. "After the changes of situation during all of these years, after the changes in title, after the execution of the oil lease and the subsequent discovery of oil, and after the discovery of facts upon which they base their title has been lost by the death of disinterested witnesses who best knew them, equity will not now enforce a claim which it seems would not likely have been asserted if oil had not been discovered on the land." Sanders, supra at 310.

Another fact, and most important under Arkansas law, the plaintiffs have completely failed to state any specific affirmative acts of concealment by the defendants or their predecessors-in-interest that would toll the statute of limitations. There are only alleged general acts of concealment by A. D. Murphy and they are alleged until 1939.

Motions to Dismiss are not favored and should be granted only where it appears to a certainty that no set of facts would be proven at trial which would entitle plaintiff to relief. Conley v. Gibson, 355 U.S. 41 (1957). As a practical matter, 12(b)(6) motions are only granted where allegations on the face of the complaint show there is some insuperable

bar to relief. Jackson Sawmill Co. v. United States, 580 F.2d 302 (8th Cir. 1978).

Even with these strong admonitions from the Supreme Court of the United States and the Eighth Circuit Court of Appeals in mind, this Court can come to no other conclusion but that this action must be dismissed. Viewing the plaintiffs' pleadings in the light most favorable to them, the Court notes that this alleged fraud occurred between 45 and 62 years ago. The plaintiffs' pleadings state specifically the plaintiffs have tried to obtain an attorney to represent them for three generations. The pleadings also state the plaintiffs' only recently discovered the fraud. If they only recently discovered the fraud, why were they

attempting to obtain an attorney for three generations "to represent them in this matter"? Logically, the Court must come to the conclusion the plaintiffs' have been aware of the alleged fraud for some time. Also the Court notes the plaintiffs' did not state anywhere in the pleadings how after this long time they "suddenly" became aware of the fraud.

The Court concludes from the same undisputed facts in the case of the plaintiffs should have, with reasonable diligence, discovered the fraud. The plaintiffs' predecessors-in-interest had a lengthy court battle in the 1920's over the disputed land that resulted in two appeals to the Arkansas Supreme Court. All of those persons involved in that lawsuit and a great number of their

children are now deceased. The alleged fraud occurred over a period of some 17 years. It is highly unlikely the fraud would have gone unsuspected and undetected for that length of time and only now have been discovered.

The Court must come to the conclusion that, without being specific as to date other than to state it must hae occurred in the lifetime of the first generation, the statute of limitations began to run and expired a long time ago on the plaintiffs and their predecessors-in-interest. The Court is also of the opinion that there are no affirmative acts of concealment that would toll the statute of limitations under Arkansas law. The complaint, therefore, must be dismissed as to

all the defendants because the plaintiff has failed to state a claim upon which relief may be granted. See Rule 12(b)(6), Federal Rules of Civil Procedure.

The Court also finds the doctrine of res judicata applicable in the instant case as concerns the claims of two of the plaintiffs' predecessors-in-interest over section eight. In Sanders v. Flenniken, 172 Ark. 454 (1926), the Arkansas Supreme Court held that the deed of trust executed by Riley Sanders and Neil Sanders was valid and the foreclosure of that deed ousted them of any interest in section eight. Riley and Neil Sanders had argued on appeal of deed of trust was invalid because they had not obtained the signature of their wives on the deed. The Arkansas Supreme Court's holding that they

had no interest in section eight operates as res judicata to their decendants' claim for an interest in that property.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the Motions to Dismiss filed by the defendants be and the same is hereby granted. The plaintiffs complaint against all of the defendants is dismissed with prejudice.

Dated this 14th day of August, 1984.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-2235

CURTIS MILLER, ET AL., *
*
APPELLANTS, *
* Appeal from
* the *
UNITED STATES
VS. * DISTRICT COURT
* for the
* WESTERN
* DISTRICT
* OF ARKANSAS
HOGG BROTHERS PARTNER- *
SHIP, ET AL., *
*
APPELLEES. *

Submitted: January 31, 1985

Filed: June 14, 1985

Before BRIGHT, JOHN R. GIBSON and FAGG, Circuit Judges.

PER CURIAM.

Curtis Miller and a group of other plaintiffs appeal the dismissal of their claim against the Hogg Brothers Partnership and a group of other defendants under 42 U.S.C. Sub. Sec. 1981, 1982, 1983, and 1985, as well as several provisions of the United States Constitution. The essence of their claim was that their predecessors-in-interest to certain land (i.e., their grandparents), were the subject of fraud and conspiracy to deprive them of the mineral interests in the land. The district court (See footnote 1) concluded that the alleged acts of fraud had occurred between 1922 and 1939, applied a five-year statute of limitations, and dismissed the claim. It also concluded that a portion of the land had been the subject of earlier litigation and

the claim in this respect was barred by res judicata. For reversal appellants argue that the district court (1) erred in finding that the statute of limitations was not tolled by fraudulent concealment; (2) erred in finding that res judicata barred part of their claim; and (3) denied them due process by summarily dismissing their complaint for failure to state a claim. We affirm the judgment of the district court.

Appellants first argue that the statue of limitations does not bar their action. In actions brought under the Reconstruction Civil Rights Acts, 42 U.S.C. Sub.Sec.

1981-1985, Federal Courts apply the most applicable state statute of limitations and also state rules on tollings. Wilson v. Garcia, ____ U.S. ____, 105 S. Ct. 1938, 1942-43 (1985); Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 483-86 (1980); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462-64 (1975). In this case the district court found that Arkansas' five-year "catch-all" statute of limitations was the most suitable. Under Arkansas law, the statute of limitations can be tolled when fraudulent acts of concealment prevent a plaintiff from discovering his cause of action. Walters v. Lewis, 276 Ark. 286, 634 S.W.2d 129, 132 (1982); Williams v. Purdy, 223 Ark. 275, 265 S.W.2d 534, 536 (1954). To constitute a "fraudulent act of concealment" - "[s]ome

affirmative act of concealment must be done; mere failure to reveal is not enough, unless there is a duty to speak." Williams v. Purdy, 265 S.W.2d at 536. Moreover, the plaintiff's cause of action accrues when he discovers the fraud, or when he should have discovered the fraud, with the exercise of reasonable diligence. See Walters v. Lewis, 634 S.W.2d at 132; Williams v. Purdy, 265 S.W.2d at 536.

To establish fraudulent acts of concealment, appellants allege that the lawyer for their predecessors-in-interest, A. D. Murphy, from 1922 until 1939 conspired with others to defraud their predecessors-in-interest of mineral rights to certain lands. In their amended complaint, appellants further allege that

they only recently discovered this fraud and conspiracy. In the same paragraph, however, they also state that their predecessors-in-interest (i.e., their parents) attempted to find an attorney to represent them in this matter, but were unsuccessful.

From these statements the district court concluded that the predecessors-in-interest had discovered the alleged fraud and conspiracy, and therefore the five-year statute of limitations had long since expired. We agree with the district court's reasoning. The cause of action accrued when the alleged fraud and the conspiracy was first discovered, see Walters v. Lewis, 634 S.W.2d at 132, and the statute of limitations clearly has expired. The district court correctly

dismissed the complaint for failure to state a claim because the face of the complaint showed an "insuperable bar to relief." Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979).

Appellants next argue that the district court erred in finding that res judicata barred part of their claim. Because we have already concluded that the district court correctly dismissed the action as barred by the statute of limitations, we need not address this most troublesome argument.

Appellants finally argue that the district court denied them due process by summarily dismissing their action for failure to state a claim. We find no

abuse of discretion in the manner in which the distric court handled this action. Before dismissing the action, the district court conducted a hearing on the motions to dismiss and thereafter gave the appellants thirty days to amend their complaint. The appellants had ample opportunity to respond to the motions to dismiss and to amend their complaint accordingly.

The judgment of the district court is affirmed. See 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT.

[DO NOT PUBLISH]

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 84-2235WA

CURTIS MILLER, ET AL,	*	
	*	
APPELLANTS,	*	
	*	
VS.	*	Appeal from
	*	the
	*	UNITED STATES
	*	DISTRICT COURT
HOGG BROTHERS PARTNER-	*	for the
SHIP, ET AL,	*	WESTERN
	*	DISTRICT
	*	ARKANSAS
	*	
APPELLEES.	*	

Petition for rehearing en banc filed by appellants is denied. Petition for rehearing by the panel is also denied.

July 12, 1985